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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 3...

SANFORD E. ADAY; WALLACE DE ORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC., a California corporation,

Petitioners,

vs.

UNITED STATES DISTRICT COU[redacted]THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, and NOEL P. FOX, Judge of the United States District Court for the Western District of Michigan, Southern Division,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

STANLEY FLEISHMAN,
1680 North Vine Street,
Los Angeles 28, California,
Counsel for Petitioners.

VANDERVEEN, FREIHOFER & COOK,
SAM ROSENWEIN,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. .....

SANFORD E. ADAY, WALLACE DE ORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC., a California corporation,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, and NOEL P. FOX, Judge of the United States District Court for the Western District of Michigan, Southern Division,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioners pray that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause on June 12, 1963.

Opinions Below.

The opinion of the United States Court of Appeals from the Sixth Circuit [R. 95-102][1] is unre-

[1]The reference "R" is to the certified record of the clerk of the court below, including the five transcripts of various District Court proceedings submitted to the court below in support of the Petition for a Writ of Mandamus and referred to in the

ported and is printed in Appendix A hereto. The omnibus opinion of the Honorable Noel P. Fox, a Judge of the United States District Court for the Western District of Michigan [R. 51-76] is also unreported and in pertinent part is printed in Appendix B hereto.

Jurisdiction.

The order and judgment of the United States Court of Appeals for the Sixth Circuit [R. 95-102] was entered on June 12, 1963 [R. 95]. By order of Mr. Justice Potter Stewart dated July 2, 1963, the time to file this petition for a writ of certiorari was extended to and including August 11, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented.

1. Whether the Court of Appeals should have granted the petition for a writ of mandamus and compelled the District Court to vacate its order granting the Government's motion to strike, and striking, petitioners' motion made before trial to dismiss the indictment upon various grounds including objections to the method of selection and organization of the grand jury which returned the indictment.

2. Whether, contrary to the provisions of the Fifth and Sixth Amendments, the laws of the United States, 28 U. S. C. 1861-1871, and Rules 6 and 12 of the Federal Rules of Criminal Procedure, the District Court erroneously struck petitioners' motion to dismiss

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Petition. For the convenience of this Court, the various physical transcripts have been brought together in chronological order in one volume, and the entire record, consisting of two volumes, has been consecutively numbered.

the indictment based on the illegal selection and organization of the grand jury which returned the indictment, wrongfully abandoned the trial of the issues involved, and unlawfully refused to make an appropriate judicial determination therein.

3. Whether the District Court unlawfully concluded that failure by putative defendants to object to the competency of a grand jury prior to the return of an indictment constituted a waiver of any objection to the array and therefore required the court to strike, as untimely made, petitioners' motion to dismiss the indictment based on various grounds including the illegal selection and organization of the grand jury which returned the indictment, the said motion to dismiss the indictment having been made prior to trial and purusant to Rules 6 and 12 of the Federal Rules of Criminal Procedure.

4. Whether the District Court unlawfully concluded that leave granted by the Senior District Judge to file "any and all motions" within a prescribed time after petitioners' arraignment, included only "pre-trial" motions, and that petitioners' motion to dismiss the indictment made prior to trial based on the illegal selection and organization of the grand jury, timely filed in accordance with the order of the Senior District Judge, was not a pre-trial motion but a "pre-arraignment" motion and was therefore required to be stricken without appropriate trial or determination of the issues presented therein.

5. Whether the District Court unlawfully concluded that petitioners' motion to transfer the proceedings pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, made and determined prior to the making

of any other motions before trial by order of the Senior District Judge, constituted an implied waiver by petitioners of any challenge to the array or the indictment and therefore required the District Court to strike petitioners' motion to dismiss the indictment made prior to trial and pursuant to the Federal Rules of Criminal Procedure.

6. Whether the District Court erroneously concluded that petitioners had impliedly and expressly waived their rights to challenge the validity of the indictment and the method of selection and organization of the grand jury which returned the indictment, and therefore required the District Court to strike petitioners' motion to dismiss the indictment based on various grounds including illegal selection and organization of the grand jury which returned the indictment.

7. Whether, since under the Fifth Amendment the petitioners could not be held to answer an invalid indictment, the District Court had the power or jurisdiction to compel petitioners to proceed to trial under the indictment herein after unlawfully striking petitioners' motion challenging the validity of the indictment based upon the ground, among others, that the grand jury which returned the indictment was illegally selected and organized.

8. Whether the Court of Appeals erred in holding that it would not decide the questions involved in the petition for a writ of mandamus until an appeal from a final adjudication of the criminal case on its merits in the District Court, and in dismissing the said petition for mandamus without issuing an order to show cause why mandamus should not issue directing the District Court to vacate its order granting the Govern-

ment motion to strike, and striking, petitioners' motion to dismiss the indictment based on various grounds including the illegal selection and organization of the grand jury which returned the indictment.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the Fifth and Sixth Amendments to the Constitution, the provisions of 28 U. S. C. 1651(a); and the pertinent provisions of Rules 6 and 12 of the Federal Rules of Criminal Procedure are printed in Appendix C hereto.

Statement of the Case.

On May 25, 1960, an indictment was returned by a grand jury in the United States District Court for the Western District of Michigan, Southern Division, charging petitioners, in a nineteen-count indictment with the use of the mails and common carriers for the delivery of books bearing eight different titles to various retail establishments in the said judicial district in violation of the federal obscenity statutes [R. 22-32]. 18 U. S. C. 1461, 1462.

The individual petitioners are long-time residents of the City of Fresno, State of California, and the corporate defendant, a California corporation, has its principal place of business in the said City of Fresno [R. 3].

1. The District Court Proceedings—Honorable Raymond W. Starr, Senior Judge.

(a) The Honorable Raymond W. Starr, Senior Judge for the Western District of Michigan, Southern Division, initially agreed to hear and determine petitioners' motion to transfer the proceedings to the Southern District of California, Northern Division prior to the arraignment of petitioners in Michigan and prior

to the making of all other motions on petitioners' behalf [R. 3].

The motion for change of venue, made pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, was argued before Judge Starr on August 15, 1960 [R. 3-4]. At the time of argument, Judge Starr stated that if the motion for change of venue were granted, petitioners would be arraigned in the California judicial district; if the motion to transfer were denied, petitioners would be arraigned in the Michigan judicial district [R. 4, 108]. Judge Starr stated that if the government or the petitioners intended to file "any further motions in this action", they should be filed before September 30, 1960 [R. 4, 108]. However, prior to September 30, 1960, by agreement between counsel for both sides, and with the approval of Judge Starr, the time to file any further motions on petitioners' behalf was extended to after the decision by Judge Starr on petitioners' motion for change of venue [R. 5].

(b) No action was taken by Judge Starr on petitioners' aforesaid motion until February 13, 1962, when a written decision was rendered denying the motion. *United States v. West Coast News Company, Inc., et al.*, 30 F. R. D. 13 (D.C. Mich., 1962).

Petitioners, pursuant to the order of Judge Starr, were arraigned in the District Court for the Western District of Michigan on March 2, 1962. At the time of arraignment, Judge Starr stated that he had been requested by petitioners' California counsel for a statement as to the length of time the court would grant for the filing of motions, "and I assured Mr. Fleishman, your California counsel, that I would grant thirty

days from this date in which to file any and all motions" [R. 6, 142]. Judge Starr then made his order on the said March 2, 1962 directing that "any and all motions which each or any or all of the defendants desire to file in this criminal action shall be filed in this Court within thirty days from this date" [R. 6, 149].

(c) Pursuant to the order of Judge Starr, and within the aforesaid prescribed time, petitioners filed a motion for a bill of particulars [Fed. Rules Cr. Proc. rule 7(f), 18 U. S. C. A.]; a motion to dismiss the indictment on various legal and constitutional grounds [Fed. Rules Cr. Proc. rule 12(b)(1)(2)]; and a separate companion motion to dismiss the indictment based on the illegal selection and organization of the grand jury [Fed. Rules Cr. Proc. rule 6(b)(1)(2)(e) and rule 12(b)(2)(4)] [R. 6, 33-35].

The grounds for the aforesaid motion to dismiss the indictment (grand jury) were, among other things, that there were substantial defects in the institution of the prosecution because the grand jury which returned the indictment was not selected, drawn or summoned in accordance with law; that the grand jury and the array from which the grand jury was chosen was not a cross section of the community and truly representative of it; and that the method of selecting the grand jurors results, and resulted, in the systematic and intentional exclusion of economic, social, geographical and other definable groups in the Western District of Michigan, Southern Division [R. 33-34].

The said motion alleged that a trial under the indictment for the aforestated reasons would deprive petitioners of their liberty and property without due

process of law, compel petitioners to confront an invalid charge returned by a grand jury illegally selected and not impartial, and result in the abridgment of the exercise of freedoms of speech and of the press [R. 34]. Petitioners in their motion requested that all issues with respect thereto be tried in a formal hearing by the court prior to the determination of the motion [R. 34], and the motion was supported by affidavits and exhibits and lengthy briefs and analyses [R. 34]. The issues raised on the motion were clearly such as entitled petitioners to present testimony at a judicial hearing as required by the Rules of Criminal Procedure and the decisions of this Court.

2. The District Court Proceedings—Honorable Noel P. Fox.

(a) Following the retirement of Judge Starr (194 F. Supp. XIII), the Honorable Noel P. Fox, the respondent herein, took the oath of office on August 8, 1962 (204 F. Supp. XIII). Judge Fox initially set all motions, including a renewed motion for transfer of proceedings, down for hearing on December 6, 1962, but then continued the matter on his own motion, ultimately fixing March 13, 1963 for hearing and argument [R. 8].

(b) One day prior to the said hearing day of March 13, 1963, the United States filed a "Motion to Strike Defendants' Motion To Dismiss Indictment (Grand Jury)" [R. 8, 36-37]. The motion to strike was untimely made under the governing rules; it was made about a year after the filing of the motion to dismiss the indictment; and, although by answer and brief, the United States had prior thereto extensively argued the motion to dismiss on the merits, it had never made a

claim that the motion to dismiss the indictment had been untimely filed, or that petitioners had waived their right to make said motion [R. 7-8].

The gist of the motion to strike made by the United States was that petitioners' California and chief counsel had been aware prior to the return of the indictment that a grand jury in the Western District of Michigan, Southern Division was investigating petitioners' activities; that petitioners thus had opportunity to challenge the array prior to the return of the indictment against them, and therefore, although petitioners' motion to dismiss the indictment had been made pursuant to Rules 6 and 12 of the Federal Rules of Criminal Procedure, and by order and leave of Judge Starr as aforestated, still the motion to dismiss the indictment was "not timely" made and that by their "laches", petitioners had "waived their objection to the array" [R. 37]. Reliance was placed upon this Court's decision in *Agnew v. United States*, 165 U. S. 36.

(b) On March 13, 1963, the day after the aforesaid motion to strike made by the United States, petitioners' chief counsel from California and local counsel being present, the court initially gave each side time to argue the law involved in each of the motions before the court [R. 9, 153]. With respect to the challenge to the array, Judge Fox stated: "If Agnew is the law and it apparently is the law in this circuit, then, of course, that would dispose of the problem" [R. 9, 153].

(c) On the third day of the hearing on the challenge to the array, the question arose as to the pattern followed by the jury commissioners in selecting trial and grand jurors for the period following that covered

by the affidavit of petitioners previously filed in support of their motion challenging the array [R. 361]. Counsel for petitioners expressed a desire to place into evidence all raw materials available for such subsequent period, the analysis of the material to be submitted later to the Court to demonstrate a continuing pattern of discrimination as shown by the evidence. The District Court stated: "If there is any summary that is to be made, as you say, Mr. Fleishman, you can make that later and each can review that as to mathematical accuracy and so forth" [R. 361-362].

With respect to the evidence presented to the District Court, Judge Fox stated during certain discussions of the testimony: "Many of those things which may constitute discrepancies or deviations from what is claimed or the norm you can point out in your brief . . . But what I am looking forward to now is to a proposed findings of fact and conclusions of law. You may supplement that with a supplemental brief" [R. 369-370]. The District Court was insistent that there be filed proposed findings of fact and conclusions of law on "the question of the challenge to the array, the challenge to the grand jury" [R. 522].

With respect to the untimely motion of the United States to strike petitioners' motion to dismiss the indictment (grand jury), Government counsel stated: "I think it would certainly be only fair if the defendants have a right to answer that" [R. 10, 524]. The District Court replied: "Oh, yes, you may answer that, no question about it. And I won't decide it until you have a chance to file briefs" [R. 10, 524]. Counsel for petitioners then inquired whether the court was concerned only with a memorandum on the grand jury

or on the other matters [R. 10, 524]. The court replied that "anything else that you think you want to inform me about, you may do so" [R. 10, 524].

As to the time for filing the aforesaid additional material, briefs and findings, Judge Fox stated: "Let's say forty-five days and see what happens. Then if there is any real hardship, you can communicate with the Court and I will consider whether or not I will give you an extension of time, and I may re-evaluate that from the standpoint of when I can get at it" [R. 10-11, 525].

All of this was on March 13, 14 and 15, 1963 [R. 150-526].

(c) On March 22, 1963, one week after petitioners' chief counsel left the hearing aforesaid in Grand Rapids, Michigan to return to his offices in Los Angeles, California, Judge Fox summoned local counsel retained by petitioners, and the United States Attorney, to advise them that he was prepared to rule immediately on all pending motions before him and to sign an order thereon [R. 11]. The forty-five day period given counsel to file briefs and proposed findings of fact and conclusions of law was rescinded. The District Court announced that the motion made by the United States to strike petitioners' motion to dismiss the indictment (grand jury) was granted and all other motions denied. The District Court stated that the court had permitted the presentation of evidence on the method of selecting the grand jury and its organization solely "for the convenience of Mr. Fleishman" who "had come from California" [R. 538].

(d) On March 29, 1963, Judge Fox signed an omnibus order [R. 48-49] denying all of petitioners' mo-

tions as aforestated, and further ordering as follows:

> ". . . It Is Ordered that the motion of the United States of America for an order striking defendants' motion to dismiss indictment (Grand Jury) be, and the same is hereby granted, and said motion to dismiss the indictment (Grand Jury) is hereby stricken . . ." [R. 49].

(e) On April 18, 1963, some three weeks after entry of the aforesaid order striking petitioners' motion to dismiss the indictment challenging the competency of the grand jury, Judge Fox rendered a written opinion [R. 51-76]. With respect to petitioners' motion to dismiss the indictment because of the illegal selection and organization of the grand jury, the District Court stated that defendants were "aware" of the pending indictment before its return and the challenge to the array was available to them [R. 53-54]; that *Agnew v. United States,* 165 U. S. 36 was dispositive of the issue [R. 55-56]; that nothing in Rule 6 nor Rule 12 of the Federal Rules of Criminal Procedure changes the intent and purpose of "the rule of the Agnew case" [R. 57-58]; that a remark made by counsel for petitioners in the argument before Judge Starr on the initial motion for change of venue indicated a "waiver" of any challenge to the indictment [R. 59]; that petitioners' motion for change of venue constituted an "implied waiver to any challenge to the array or the indictment" [R. 59]; that the order of Judge Starr made upon arraignment granting petitioners leave to file "any and all motions" was intended to cover only "pretrial motions", and not "pre-arraignment motions", and that motions challenging the competency of a grand jury or the sufficiency of an indictment are only "pre-arraignment" motions [R. 61].

Judge Fox also stated in his opinion the following:

"The fact that the court granted permission to present testimony and arguments concerning testimony of the grand jury indictment does not constitute a waiver by this court. All this was specifically taken subject to the objection of the Government; and, also, to give the court an opportunity to re-examine and reconsider the effect and force of Agnew . . . The government's motion to strike is granted" [R. 12, 65].

Having devoted 14 pages of the opinion to thus support its order and ruling granting the Government's motion to strike petitioners' challenge to the validity of the indictment, and to support the abandoning of the trial of the issues, the District Court added that for the "purposes of thoroughness", the court felt it proper to state that the attack on the array was not well taken, that petitioners had failed to meet their burden of proof [R. 15, 65].

3. The Court of Appeals Proceedings.

(a) On April 29, 1963, petitioners duly filed a Petition for Writ of Mandamus with the United States Court of Appeals for the Sixth Circuit, together with supporting brief, transcripts and other papers, seeking in the light of all the aforesaid, to vacate so much of the omnibus order aforestated as granted the motion of the United States to strike, and struck, petitioners' motion to dismiss the indictment based on various grounds including the challenge to the array [R. 1-76].

(b) The said petition for a writ of mandamus to the Court of Appeals urged that the order of the District Court striking petitioners' motion to dismiss the

indictment as aforesaid was unconstitutional, null and void because the action of the District Court was unauthorized and without basis in law or fact; because such action deprived petitioners of liberty without due process of law; because such refusal to exercise jurisdiction and appropriately determine said motion was contrary to law and the requirements of the Constitution and a gross abuse of discretion; because such action by the District Court deprived petitioners of the right to a fair hearing, and the right to a fair trial under a valid indictment; because such action by the District Court subjected petitioners to an unconstitutional trial under an illegal indictment at great physical risk and financial burdens in a far removed forum arbitrarily chosen by the United States as the venue for prosecution of petitioners; and because such action and procedures of the District Court arbitrarily and discriminatorily abridged petitioners' liberties in violation of the First, Fifth and Sixth Amendments [R. 16-17].

The said petition requested that a writ issue to the District Court requiring the said court to show cause why mandamus should not issue to compel the District Court to exercise its authority because it was the duty of the District Court to do so; that the writ lay to compel a proper and lawful determination of the issues presented to the District Court on the motion to dismiss the indictment; and that the court had misjudged its powers in failing to make such determination; that mandamus should issue because the authority of the District Court had been exceeded by contravening the rules and statutes governing procedures in criminal causes in the federal courts as aforestated; and that

the writ should issue to enforce the clear legal and constitutional rights of petitioners [R. 17].

(c) The Court of Appeals declined to issue any order requiring the District Court to show cause why a writ of mandamus should not issue as requested by petitioners. Instead, the Court of Appeals dismissed the petition for a writ of mandamus without consideration of the merits of petitioners' claims [R. 102].

After briefly summarizing the sequence of events as set forth in the petition for a writ of mandamus [R. 95-100], the Court of Appeals stated:

> ". . . . Petitioners assert that the motions to dismiss the indictment were made diligently within the prescribed time limitations and in strict compliance with the Federal Rules of Criminal Procedure and by express leave of now Senior District Judge Starr. They claim that no challenge to the array before indictment is required under the present Rules of Criminal Procedure. They contend that the record shows that there was no express or implied waiver of the petitioners' objections to the indictment. Finally, they contend that the case on the merits of the grand jury array was not completed and, accordingly, the district judge was in error in ruling as he did" [R. 100-101].

Despite the aforesaid claims thus summarized by the Court of Appeals, the court declined to "decide the questions involved at this juncture of the proceedings" [R. 102]. The Court of Appeals held that there could be no determination of the issues presented until "a

final adjudication of the case on its merits in the District Court" [R. 102].[2]

Reasons for Granting the Writ.

1. The decision of the District Court striking petitioners' motion to dismiss the indictment challenging, among other things, the competency of the grand jury which returned the indictment was clearly erroneous. Reliance upon this Court's decision of 1897 in *Agnew v. United States*, 165 U. S. 36 to render nugatory the provisions of Rules 6 and 12 of the Federal Rules of Criminal Procedure, enunciated by this Court in 1945 to govern the procedures affecting the administration of criminal justice in the federal courts, resulted in the deprivation of petitioners' clear legal and constitutional rights.

Since an indictment found by a grand jury illegally selected and organized is "no indictment" at all (*Ex parte Bain*, 121 U. S. 1, 13), and since, under such circumstances, "the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment" (*Id.*, at 13), the Court of Appeals erred in failing to issue an order to show cause why petitioners' challenge to the validity of the indictment was stricken and in dismissing the petition for a writ of mandamus without hearing. See, *McClellan v. Carland*, 217 U. S. 268, 283-284. Mandamus traditionally issues to confine

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[2] The Court of Appeals decision, rendered on June 12, 1963, also included a denial of an application for a stay of the trial of the case [R. 77-94] scheduled to commence June 17, 1963, the date having been changed to June 24, 1963 by the District Court before the Court of Appeals made its ruling [R. 101-102]. The trial of the action was, however, thereafter continued by the District Court and is now set for October 28, 1963.

inferior courts to the exercise of their jurisdiction and to compel them to exercise their authority when it is their duty to do so. *United States Alkali Export Association v. United States*, 325 U. S. 196, 202.

The action of the courts below, thus imposing upon petitioners "the trouble, expense and anxiety of a public trial" (*Ex parte Bain*, 121 U. S. 1, 12) under an indictment which was "no indictment" of a competent grand jury, was coupled with the attendant infringement of the constitutional policies embodied in the Fifth and Sixth Amendments conferring upon an accused the right not to be held to answer a criminal accusation unless on indictment of an impartial and validly selected and organized grand jury. The serious and prejudical disregard of the plain provisions of the Federal Rules of Criminal Procedure intended to guarantee both the procedural rights of those accused of crime and the true administration of criminal justice in the federal courts, together with the hardships imposed upon petitioners and the abridgments of their constitutional rights as aforesaid, raised important questions involving the power and jurisdiction of the district court to proceed.[3]

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[3] "It is no avail under such circumstances, to say that the court still has jurisdiction of the person and of the crime, for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by the indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the constitution, can be held to answer, he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered." *Ex parte Bain*, 121 U. S. 1, 13-14. See also, *Roche v. Evaporated Milk Association*, 319 U. S. 21, 26-27.

The case here is therefore of general importance and is analogous to those in which writs have issued under 28 U. S. C. 1651(a) as a proper means of protecting the right to a jury trial (*Dairy Queen, Inc. v. Wood*, 369 U. S. 469; *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500) and to enforce conformity to rules of procedure promulgated by this Court under powers vested by law (*Los Angeles Brush Manufacturing Corp. v. James*, 272 U. S. 701; *McCullough v. Cosgrove*, 309 U. S. 634; *LaBuy v. Howes Leather Co.*, 352 U. S. 249).

The action of the Court of Appeals, refusing to issue an order to show cause and dismissing petitioners' petition for a writ of mandamus, is clearly inconsistent, it is submitted, with the protections clearly recognized in the decisions of this Court for the protection of those accused of crime to the constitutional right to be free from accusation of wrongdoing unless on valid indictment returned by a competent grand jury. *Smith v. Texas*, 311 U. S. 128, 132; *Glasser v. United States*, 315 U. S. 60; *Ballard v. United States*, 329 U. S. 187, 195.

2. The District Court placed great stress on *Agnew v. United States*, 165 U. S. 36, 17 S. Ct. 235 (1897), holding that since petitioners here knew that a prosecution was threatened, petitioners should have objected to the array before the indictment was found; failing to do so, petitioners waived any right to challenge the selection of the array.

Some 40 years after the decision in *Agnew*, the Congress of the United States vested power in this Court to prepare rules of criminal procedure in criminal cases in district courts of the United States. Act

June 29, 1940, c 445, 54 Stat. 688. Pursuant to the said Act of June 29, 1940, this Court appointed an Advisory Committee on Criminal Rules to assist the Court in the preparation of the rules. Federal Rules of Criminal Procedure, 18 U. S. C. A., XV-XVI. The tentative rules proposed by the Advisory Committee were the subject of wide discussion in the Bar. See, 5 F. R. D. 150, 151; 22 F. R. D. 343; 29 F. R. D. 43. Finally, the Federal Rules of Criminal Procedure were adopted in 1945, and these Rules "govern all criminal proceedings thereafter commenced" (Fed. Rules Cr. Proc., Rule 59, 18 U. S. C. A.).

Rule 6(b)(1) [Challenges] permits the attorney for the government or a defendant to challenge an array of grand jurors on the ground of their illegal selection, before the administration of the oath to the jurors.

Rule 6(b)(2) [Motion to Dismiss] provides that a motion to dismiss the indictment may be based on the objections to the array, if not previously determined upon challenge.

The Notes of the Advisory Committee on Rules under Rule 6 states, among other things, as follows:

> "Challenges to the array and to individual jurors, although rarely invoked in connection with the selection of grand juries, are nevertheless permitted in the Federal courts and are continued by this rule. United States v. Gale, 3 S. Ct. 1, 109 U.S. 65, 69-70, 27 L. Ed. 857; Clawson v. United States, 5 S. Ct. 949, 114 U. S. 477, 29 L. Ed. 179; Agnew v. United States, 17 S. Ct. 235, 165 U.S. 36, 44, 41 L. Ed. 624. It is not contemplated, however, that defendants held for action

of the grand jury shall receive notice of the time and place of the impaneling of a grand jury, or that defendants in custody shall be brought to court to attend at the selection of the grand jury. *Failure to challenge is not a waiver of any objection. The objection may still be interposed by motion under rule 6(b)(2).*" (Emphasis added.)

Rule 12 of the Federal Rules of Criminal Procedure deals with pleadings and motions before trial. Rule 12(a) provides that demurrers and motions to quash are abolished, and that defenses and objections to the indictment "shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules." Rule 12(b)(1) provides that "any" defense or objection which is capable of determination without the trial of the general issue "may be raised before trial by motion." Rule 12(b)(2) provides that defenses and objections based on defects in the institution of the prosecution or in the indictment (other than it fails to show jurisdiction or charge an offense) may be raised "only by motion before trial." The motion must include all defenses and objections available to an accused. Rule 12(b)(3) provides that motions shall be made before plea, "but the court may permit it to be made within a reasonable time thereafter."

The Notes of the Advisory Committee on Rules under Rule 12, read, among other things, as follows:

"Note to Subdivision (b) (1) and (2). These two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by rule 12(a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. . . .

"In the first of these groups are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense. All such defenses and objections must be included in a single motion. (Cf. Rule 12(g) of Federal Rules of Civil Procedure.) *Among the defenses and objections in this group are the following: Illegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings,* defects in indictment or information, other than lack of jurisdiction or failure to state an offense, etc. . . .

. . .

"Note to Subdivision (b) (3). This rule, while requiring the motion to be made before pleading, vests discretionary authority in the court to permit the motion to be made within a reasonable time thereafter. The rule supersedes 18 U.S.C.A. §§3288, 3289, formerly §556a fixing a definite limitation of time for pleas in abatement and motions to quash. The rule also eliminates the requirement for technical withdrawal of a plea if it is desired to interpose a preliminary objecton or defense after the plea has been entered. Under this rule a plea will be permitted to stand in the meantime." (Emphasis added.)

It is submitted, in the light of the aforesaid, that the District Court was clearly wrong in holding that the 1897 rule of *Agnew* has not been changed by the Federal Rules of Criminal Procedure. The attempted dis-

tinction by the District Court between "pre-arraignment motions" and "pre-trial motions" finds no support in the law. Motions are made before plea unless the court permits them to be made within a reasonable time thereafter. The Rules of Criminal Procedure abolish a definite limitation of time for motions to dismiss, and eliminate the requirement for technical withdrawal of a plea if it is desired to interpose a preliminary objection or defense after the plea has been entered.

The record is clear that petitioners duly filed their motions to dismiss the indictment pursuant to the Federal Rules of Criminal Procedure, and that petitioners moved diligently and always by leave of Judge Starr, and in compliance with his express orders. It is, of course, quite true that counsel for petitioners, with the permission of the then United States Attorney, sent a letter to the Grand Jury prior to the return of the indictment. However, as the Federal Rules of Criminal Procedure provide, as aforestated, this did not require counsel to challenge the array prior to indictment. If an indictment was returned, and the communication was sent by counsel on behalf of petitioners, with permission, in the hope that it would not be, the Rules provide that the objection to the array can be raised by motion to dismiss the indictment. In this respect, as the Notes of the Advisory Committee show, the rule of *Agnew* is not applicable.

3. The District Court stated that petitioners' first motion in the case was to transfer the action to the Southern District of California, and that if the transfer had been granted, "surely the challenge of an allegedly unlawfully convened Grand Jury" would "never have been made" [R. 54]. There is not the slightest

support in the record for this conjecture by the District Court.

There can be no question of the power of Judge Starr, prior to trial, to entertain a motion for transfer of proceedings pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, and making a decision thereon, before requiring the filing of any other motions prior to trial under the Rules. Clearly, both under the Rules (See, Rule 12(b)(3) and Rule 22) and as a matter of inherent power, Judge Starr had the authority to control the order in which motions prior to trial were to be made before the court.

There was, therefore, no implied waiver of petitioners' rights by the filing of their motion for transfer prior to the filing of all other motions. The motion was made and argued on August 15, 1960. The opinion of Judge Starr, however, was not rendered until February 13, 1962. 30 F. R. D. 13. Upon the rendition of the opinion denying change of venue, Judge Starr ordered arraignment of petitioners on March 2, 1962. Prior thereto, Judge Starr, the Senior Judge of the United States District Court "assured" counsel for petitioners that the court would "grant thirty days" from the day of arraignment in which to file "any and all motions" [R. 143, 149]. Within the said thirty days, petitioners filed their motions to dismiss the indictment on the various legal and constitutional grounds authorized by Rules 6 and 12 of the Federal Rules of Criminal Procedure, and for a bill of particulars authorized by Rule 7(f) thereof [R. 6].

In the light of the record as aforestated; in the light of the express orders and directions of Judge Starr, it was not appropriate, it is submitted, for the District

Court to assert that because petitioners "waited" until the motion to transfer was decided, petitioners must be deemed to have taken "their chances" and "deliberately waived the right to object to the array" [R. 60].

The District Court also stated that by making a motion to transfer the proceedings, petitioners impliedly waived any challenge to the array or the indictment generally. It was stated that the very nature of a motion to transfer "is to place the case in a posture for trial"; that petitioners wanted the case transferred to a jurisdiction where they could have "*a fair trial*, that is, dispose of the case by plea or on its merits"; that "the whole thrust" of the motion to transfer is that "the indictment is good and defendants are ready to proceed to trial," citing the oral arguments before Judge Starr on August 15, 1960 [R. 59-60].

These statements were not in accordance with the facts in the record, nor with the applicable law. Petitioners did not move for a transfer of proceedings pursuant to Rule 21(a), but pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure. Petitioners, therefore, did not seek transfer on grounds of prejudice and inability to get a fair trial. Petitioners sought a transfer "in the interest of justice."

Nothing in the Rules or precedents suggests that because an accused makes a motion for change of venue, he thereupon waives all other motions available to him, and that the case must thereafter be disposed of solely "by plea or on its merits." Such a principle would virtually emasculate Rule 21, and do violence to the whole purpose and intent of the rules as evidenced by Rules 6, 7 and 12 dealing with motions to dismiss and for bills of particulars.

The District Court essentially refused to accept the power of Judge Starr to make the orders he did make in the case herein. Judge Starr agreed to hear the motion for change of venue prior to the making of any other motions. Therefore, when counsel for petitioners argued before Judge Starr on August 15, 1960 on the single motion for transfer, the issue of the validity or invalidity of the indictment was not before Judge Starr. There was no motion to dismiss the indictment before the court; counsel was only arguing the need for a transfer in the interest of justice.

All other motions, by order of Judge Starr, were to abide Judge Starr's decision on the motion for change of venue. It was therefore without basis in law or fact for the District Court to assert that petitioners "deliberately waived" their right to object to the array or to make any motions with respect to the indictment.

4. Recognizing that Judge Starr granted petitioners the right to make "any and all motions" after decision on the motion for change of venue, and arraignment, the District Court insisted that a request to file motions "without specific reference to a challenge to the array or to an indictment" [R. 61] is insufficient "to preserve a challenge to the array or the indictment" [R. 61].

Clearly, under the Rules, an objection to the array is now included in a motion to dismiss the indictment, as petitioners have heretofore demonstrated. A motion to dismiss an indictment on all available grounds, like a motion for a bill of particulars, can now be made before or after arraignment by order of the District Court. So long as the motions are made before trial by leave of court, the motions are duly made. When, therefore,

Judge Starr, prior to trial, granted petitioners leave to file "any and all motions" within a prescribed time, the court not only acted within the court's powers, but the court was obviously granting leave for petitioners to file a motion to dismiss the indictment upon any grounds available to petitioners, and any other motion available, like a motion for a bill of particulars. There was simply no onus upon counsel, or Judge Starr, to specify on arraignment of the particular motions to be filed thereafter.

Judge Starr made his order: petitioners to file "any and all motions" within thirty days following arraignment. Judge Starr had the power to make such order upon good cause satisfactory to Judge Starr. Rule 12(b)(3). The District Court, finding it impossible to overlook this clear record and the Rules, was thus compelled to support its theory of "waiver" by asserting that it was necessary to specify the motions to be made. This improvised requirement was not imposed by Judge Starr, the Senior Judge of the United States District Court. It is submitted that such requirement finds no support in law or reason.

5. The District Court stated that a sentence contained in the argument of petitioners' counsel on the motion for change of venue signified [R. 59] an "express waiver," not only of the challenge to the array but the motion to dismiss the indictment [R. 59, 65].

A waiver is never lightly to be presumed. The classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U. S. 458, 464—"an intentional relinquishment or abandonment of a known right or privilege" (see also, *Fay v. Noia*, 83 S. Ct. 822, 849)—is clearly not applicable to the facts here presented.

In the first place, as an examination of the entire transcript of August 15, 1960 reveals [R. 106-139], counsel and court were discussing only one motion—a motion for change of venue, and counsel and court had been advised prior thereto that petitioners would make other motions thereafter. In the second place, the sentence [R. 137] upon which the district court seized, did not "expressly waive" a challenge to the array or the indictment. The sentence merely stated that counsel then was not asking the court to quash the indictment. In the third place, in context, it is clear that counsel was urging that the only motion before the court was a motion for change of venue, and that considerations governing a motion to quash an indictment were not before the court. In the fourth place, after the sentence was enunciated by counsel, Judge Starr stated that if the parties intended to make "any further motions in this action" [R. 139], the motions should be filed thereafter on a date specified by the court. Clearly, Judge Starr did not believe that petitioners had "expressly waived" their rights to make such basic motions as motions to dismiss the indictment on all available grounds and for a bill of particulars.

Finally, the Government has never claimed such "express waiver," and indeed could make no such claim since it answered and briefed all the motions on the merits.

6. Although the Rules of Criminal Procedure and the Advisory Notes of the Committee make it clear that a challenge to the array may be made by motion to dismiss an indictment, and that "failure to challenge is not a waiver of any objection," the District Court insisted that the *Agnew* rule compels a holding of

"waiver," and that later decisions supported the District Court's view. On examination, however, the cases cited by the court are totally different on essential facts and the law expressed in those cases, rightly considered, is contrary to the District Court's position.

Some of the lower court decisions cited by the District Court [R. 60-64], like *Cook v. United States*, 4 F. 2d 517 (5 Cir. 1925); *Wolfson v. United States*, 101 Fed. 430 (5 Cir. 1900); and *Wagner v. United States*, 67 F. 2d 656 (9 Cir. 1933), were decided many years before the adoption of the Federal Rules of Criminal Procedure. Other decisions, cited by the District Court, *Poliafico v. United States*, 237 F. 2d 97 (6 Cir. 1956); *Miranda v. United States*, 255 F. 2d 9 (1 Cir. 1958); *United States v. Gilboy*, 162 F. Supp. 384 (D. C. Pa. 1958); and *Shotwell Manufacturing Co. v. United States*, 371 U. S. 341, are totally irrelevant, for the motions there made came for the first time after the commencement of the trial, and in some cases, years after the trial. Indeed, the latter cases stress the requirement for making motions challenging the validity of an indictment prior to trial pursuant to Rules 6 and 12 of the Federal Rules of Civil Procedure, as was done here. See, *Shotwell Mfg. Co. v. United States*, *supra*, at 362.

It is submitted that the record is barren of any evidence of "waiver," that petitioners made all motions diligently and in due compliance with the Federal Rules of Criminal Procedure and the orders of Judge Starr, Senior Judge of the United States District Court for the Western District of Michigan, Southern Division. The action of the District Court was unauthorized and a violation of clear legal and constitutional rights.

7. Following 14 pages of discussion on "waiver," the District Court concluded with the statement that "the government's motion to strike is granted," the order to that effect having indeed been signed weeks before on March 29, 1963. The District Court then added "for purposes of thoroughness" that the attack on the array was not well taken, "that as a matter of fact," petitioners "have failed to meet their burden of proof".

The case before the District Court was not complete, as the Statement of the Case, *supra*, makes evident. Additional evidence, materials, briefs and analyses were yet to be filed with the District Court. The District Court had itself insisted upon submission of proposed findings of fact and conclusions of law, and indeed, it appears, that such findings and conclusions of law are required. See Fed. Rules Cr. Proc. Rule 23(c), 18 U. S. C. A.

The unsupported assertions of the District Court were therefore inextricably linked with the District Court's decision that no proper motion challenging the array was before the court. Moreover, we are not left in doubt as to the District Court's abandonment of the trial of the issues. As the opinion of the District Court itself states, the fact that the District Court "granted permission to present testimony and arguments concerning competency of grand jury indictment does not constitute a waiver by the court" [R. 62]; the court permitted such presentation "as an accommodation to Mr. Fleishman because of the distance he had traveled" [R. 62], and the testimony was only taken "to give the court an opportunity to re-examine and reconsider the effect and force of Agnew" [R. 62].

It appears clear that the District Court declined to make an appropriate determination of the issues before the court, and this because the District Court had concluded that the challenge to the array was waived and therefore required no determination on the merits.

8. As aforestated, the action of the Court of Appeals below was inconsistent with protections clearly recognized for the important legal and constitutional rights of petitioners. The District Court manifestly erred in striking petitioners' challenge to the validity of the indictment upon various grounds including the competency of the grand jury which returned the indictment, and the Court of Appeals should have corrected the error of the District Judge, it is submitted, by granting the petition for mandamus.

It should be noted that the Court of Appeals seemingly treated the facts and claims of petitioners set forth in the petition for mandamus as true, much in the same manner as a demurrer to a complaint. The Court refused to issue an order to show cause, principally upon the basis that the issues presented would be equally before the Court on appeal if there were a judgment of conviction; that mandamus could not be used "as a substitute" for appeal; and that the case was not such as to require the use of the "extraordinary" writ of mandamus.

In view of the questions of jurisdiction and power of the District Court to proceed herein; the constitutional importance of the challenge to the indictment based upon the incompetency of the grand jury which returned the indictment; the serious disregard of the governing rules of criminal procedure promulgated to assure procedural safeguards for those accused of

crime in the federal courts; and in light of the uncontradicted record before the Court below, the case plainly called for the issuance of the writ of mandamus, or at least for a hearing by the Court of Appeals after issuance of an alternative writ, or order to show cause.

In addition, the issue before the District Court was whether the petitioners, presumed to be innocent, could be subjected to an oppressive public prosecution and subjected to the tremendous financial and physical burdens imposed upon petitioners by a trial in a forum opportunistically selected by the prosecution (see, *United States v. Johnson*, 323 U. S. 273, 275), a forum more than 2,500 miles from petitioners' residences, families and place of business.

Plainly, if petitioners are compelled to go to trial without lawful opportunity to challenge the validity of the indictment, the question of their right to be secure by lawful challenge against "the trouble, expense and anxiety of a public trial", as stated by this Court in *Ex parte Bain, supra*, will to that extent become moot. Compare, *St. Pierre v. United States*, 319 U. S. 41. The hardships and burdens will have been irretrievably visited upon the accused, even if their constitutional rights in these respects are ultimately vindicated on appeal. Of course, the same invidious result will occur if the petitioners are eventually acquitted at the trial of the action.

Moreover, if on eventual appeal from a judgment of conviction, the Court of Appeals, or this Court on certiorari, should hold that the action of the District Court was clearly erroneous, reverse the judgment of conviction and hold that the District Court should be

compelled to reinstate petitioners' motion to dismiss the indictment and the challenge to the grand jury, and to fairly and appropriately determine the issues on the evidence presented after a full hearing, additional factors affecting the administration of justice will arise. It will not only be necessary to have what will amount to virtually two trials—one on the grand jury and a new trial on the charge under the indictment, if the challenge to the grand jury is not sustained, but it is quite possible that individuals on the particular jury panel will be difficult or impossible to locate to establish the methods and practices used at the time when the indictment was returned. The true administration of criminal justice cannot be effective under such circumstances.

It is submitted, therefore, for all the aforesaid legal and constitutional reasons, that the Court of Appeals clearly erred in holding that determination of the issues here could be adequately disposed of by "appeal" after final adjudication on the merits. On the contrary, the case appears peculiarly appropriate, it is submitted, for determination on mandamus.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

STANLEY FLEISHMAN,
Counsel for Petitioners.

VANDERVEEN, FREIHOFER & COOK,
SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Opinion of the Court of Appeals.

United States Court of Appeals for the Sixth Circuit.

Sanford E. Aday, Wallace De Ortega Maxey, and West Coast News Company, Inc., a California corporation, Petitioners, v. United States District Court for the Western District of Michigan, Southern Division, and Noel P. Fox, Judge of the United States District Court for the Western District of Michigan, Southern Division, Respondents. No. 15381.

Filed June 12, 1963.

ORDER

Before: Cecil, Chief Judge, Weick and O'Sullivan, Circuit Judges.

This cause is before the Court on a petition by Sanford E. Aday, Wallace De Ortega Maxey, and the West Coast News Company, Inc., for a writ of mandamus against the United States District Court for the Western District of Michigan, Southern Division, and Noel P. Fox, District Judge. Petitioners have also submitted an application for a stay of further proceedings in the District Court for the Western District of Michigan pending determination of the petition for writ of mandamus.

The record discloses the following proceedings in the District Court: The petitioners were indicted on May 24, 1960, by a federal grand jury in the Western District of Michigan, for use of the mails for the delivery of obscene materials. Counts 1 through 6 of the indictment charged that the mails were used to deliver

certain obscene, lewd and indecent books into the district, in violation of Sec. 1461, Title 18, U.S.C. Counts 7 through 19 charged that the defendants used a common carrier in interstate transportation to deliver certain obscene, lewd and indecent books into the district, in violation of Sec. 1462, Title 18, U.S.C.

On August 15, 1960, the defendants filed a motion pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, seeking to transfer this criminal proceeding from the Western District of Michigan to the Southern District of California. A hearing was held on the motion and arguments were presented by counsel. At the hearing Judge Starr ordered that any further motions were to be filed before September 30th. The defendants' motion to transfer the action to the Southern District of California was denied on February 13, 1962, by Judge Starr. (The opinion is reported at 30 F.R.D. 13.)

On March 2, 1962, the defendants were arraigned before Judge Starr. At that time Judge Starr granted thirty days in which to file any and all motions. On March 30, 1962, the defendants filed a motion to dismiss the indictment alleging that the grand jury was not legally constituted. A motion was also filed to dismiss the indictment because of an alleged unconstitutional application of the statutory law controlling the use of the mails. A motion for a bill of particulars was also filed at that time.

The United States filed on March 12, 1963, a motion to strike the motion to dismiss the indictment filed by the defendants which challenged the array of the grand jury. The government's motion asserted that the challenges to the array and the indictment

were not *timely* made and, therefore, the defendants had waived their right to challenge the array of the grand jury.

On March 13, 14 and 15, 1963, a hearing was held before Judge Fox on the motion challenging the array of the grand jury. The District Court took testimony, oral and documentary, in support of the claim that the grand jury which returned the indictment was illegally constituted. This testimony was taken subject to the court's reservation of the *waiver* issue. At the conclusions of the hearing, the District Court allowed 45 days to file briefs on all issues involved in the different motions before the court.

On March 22, 1963, one week after the conclusion of the hearing on the motion challenging the array of the grand jury. Judge Fox called a pre-trial conference. He advised counsel that he was prepared to rule on all pending motions before the court. Accordingly, the 45-day period for filing briefs was rescinded. The court had, at that date, determined that the defendants had waived a challenge to the array of the grand jury. An order denying all motions was entered March 29, 1963.

Judge Fox's formal opinion denying all the defendants' motions was filed on April 18, 1963. The ruling that the defendants had waived their rights to challenge the array of the grand jury is the crux of this mandamus proceeding.

Judge Fox ruled that Judge Starr's announcement at the arraignment, granting 30 days in which to file all motions, was directed to all pre-trial motions and not to all pre-arraignment motions. "Motions to the

competency of the Grand Jury or to the sufficiency of the indictment or information, are pre-arraignment motions. Federal Rules of Criminal Procedure, Rule 12(b)(3)." Opinion reported at F. Supp.

"Defendants delayed filing the motion to dismiss the indictment on their challenge to the array until March 27, 1962, one year, ten months and three days after the return of the indictment against them * * *, id., at . Relying on *Agnew v. United States,* 165 U. S. 36, Judge Fox determined that in the present case the defendants had "abundant opportunity to object to the competency of the Grand Jury before the indictment was found, and certainly much sooner than (they) did after indictment was returned," id., at . "Neither Rule 6 nor Rule 12 of the Federal Rules of Criminal Procedure changes the intent and purpose of the rule of the Agnew case, excepting, however, the rules do give the court the power for *good cause shown,* to grant relief from a waiver," id., at

"Also, defendants' motion to transfer the case to the Southern District of California constitutes an implied waiver to any challenge to the array or the indictment," id., at . "The whole thrust of the motion to transfer is that the indictment is good and defendants are ready to proceed to trial," id., at .

"Thus, by every conceivable norm of judgment, both motions challenging the grand jury's competency and the indictment are untimely. An examination of the proceedings as a whole, to this point, clearly impresses these motions with a badge of studied dilatory tactics," id., at

"For purposes of thoroughness, the court feels it proper to here state in its opinion that the attack on

the array on its merits, is not well taken * * * and I find as a matter of fact that the defendants have failed to meet their burden of proof," id., at .

The defendants had filed on December 3, 1962, a motion for renewal and reargument of the motion to transfer pursuant to Rule 21(b). On April 18, 1963, Judge Fox denied this motion in his "omnibus" opinion. Then on April 26, 1963, the petitioners filed in the United States Supreme Court, Miscellaneous Docket, No. 1426, a motion for leave to file a petition for writ of mandamus, and a petition for writ of mandamus, seeking to vacate the order of the District Court below which denied the transfer of proceedings to California. This mandamus proceeding is still pending in the Supreme Court.

On April 29, 1963, the petitioners filed a petition seeking a writ of mandamus in the Court of Appeals for the Sixth Circuit. This writ of mandamus is sought under the All Writs Statute, Sec. 1651(a), Title 28, U.S.C., and Rule 29 of this Court. An accompanying brief in support of the petition for writ of mandamus was filed. The petition seeks to vacate the order of the District Court which struck the motion to dismiss the indictment, challenging the array of the grand jury. The petitioners also seek to have the order vacated which set the action for trial on June 17, 1963.

The petitioners claim that unless the trial is stayed they will be irreparably injured and deprived of their constitutional rights. Petitioners assert that the motions to dismiss the indictment were made diligently within the prescribed time limitations and in strict compliance with the Federal Rules of Criminal Procedure and by express leave of now Senior District Judge

Starr. They claim that no challenge to the array before indictment is required under the present Rules of Criminal Procedure. They contend that the record shows that there was no express or implied waiver of the petitioners' objections to the indictment. Finally, they contend that the case on the merits of the grand jury array was not completed and, accordingly, the district judge was in error in ruling as he did.

On May 16, 1963, the petitioners moved in the District Court for an order staying the trial of the action. This motion was denied by Judge Fox on May 28, 1963. However, the trial was continued for one week, from June 17, 1963 to June 24, 1963.

On May 31, 1963, the defendants applied to this Court for a stay of the trial of this case scheduled to commence June 17, 1963, pending determination of the petition for writ of mandamus. (That date has been changed to June 24, 1963.) The grounds asserted in seeking the stay are: (1) the pending mandamus proceeding seeking transfer now pending before the United States Supreme Court; (2) the mandamus proceeding challenging array of the grand jury now before the Court of Appeals for the Sixth Circuit; (3) the petitioners will be irreparably injured and deprived of their constitutional rights unless the trial of the action is stayed; (4) the indictment does not inform the petitioners as to what is the relevant community in determining whether the books are obscene. On June 10, 1963, the United States answered these contentions in a memorandum in opposition to the application for a stay of trial.

Mandamus is an extraordinary remedy. The issuance of a writ of mandamus against a judge is re-

served for really extraordinary causes. Mandamus cannot be used as a substitute for appeal. *Roche v. Evaporated Milk Association,* 319 U.S. 21, 26; *Parr v. United States,* 351 U.S. 513, 520-21; *Ex parte Fahey,* 332 U.S. 258, 259-60; *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 382-85; *Beneke v. Weick,* 275 F.2d 38, 39-40, C.A. 6; *Regec v. Thornton,* 275 F.2d 801, 802, C.A. 6; *Massey-Harris-Ferguson v. Boyd,* 242 F.2d 800, 803, C.A. 6, cert. denied, 355 U.S. 806.

This Court will not decide the questions involved at this juncture of the proceedings, nor grant an interlocutory appeal on the questions here presented in the petition for mandamus. There can be no appeal until there is a final adjudication of the case on its merits in the District Court. This case is not such as to require the use of the extraordinary writ of mandamus.

It is ordered that the petition for mandamus be and it is hereby dismissed and it is further ordered that the motion for stay of further proceedings be and it is hereby denied.

Chief Judge, United States Court
of Appeals, Sixth Circuit.

APPENDIX B.

Portion of Opinion of District Court Relating to Motion to Dismiss Indictment.

United States of America, In the United States District Court, for the Western District of Michigan, Southern Division.

United States of America, Plaintiff, v. West Coast News Company, Inc., a California corporation, Sanford E. Aday and Wallace De Ortega Maxey, Defendants. Criminal No. 6615.

This case, in which the United States, by a Grand Jury Indictment, charged the defendants in nineteen counts with violating Title 18, USC 1461 and 1462, using the mails and a common carrier for delivery of obscene books, is challenged by defendants through six motions.[1]

The indictment was found in the district of alleged distribution and delivery of the books, Title 18 USC. §3237(a).

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[1]The particular motions are categorically as follows:

(1) Defendants' motion in pursuance to Federal Rules of Criminal Procedure, Rule 21(b), for transfer of this proceeding from this district to the Southern District of California, which was filed August 15, 1960.

(2) Defendants' motion to dismiss the indictment because of the alleged invalidity of the Grand Jury, filed on March 30, 1962.

(3) Defendants' motion to dismiss the indictment because it is an unconstitutional application of the statutory law controlling use of the mails, filed March 30, 1962.

(4) Defendants' motion for a bill of particulars, also filed on March 30, 1962.

(5) Defendants' motion for renewal and reargument of the motion to transfer pursuant to Rule 21(b), filed December 3, 1962.

(6) Defendants' motion to reduce the bond, filed March 1, 1963.

The United States filed a motion to strike defendants' motion to dismiss the indictment because of the alleged invalidity of the Grand Jury, March 12, 1963. The Government's motion is based on the issue of timeliness of challenges to the array and the indictment. Agnew v. United States, 165 U.S. 36.

Briefs were filed on all motions, excepting the Government's motion to strike.

Arguments on all motions were presented to the court through most of March 13, 1963. Testimony in support of defendants' position challenging the Grand Jury was presented through the balance of the 13th, and on the 14th and 15th of March. Testimony was taken subject to the court's reservation concerning the effect of the Agnew case, supra, and in order to accommodate defendants' attorney, Mr. Fleishman, who had traveled in from California to present defendants' position.

1. MOTION TO TRANSFER.

Senior Judge Raymond W. Starr, then chief judge, filed an opinion and denied the first motion to transfer the case to the Southern District of California, on February 13, 1962.

2. MOTION TO DISMISS THE INDICTMENT BECAUSE OF THE ALLEGED INVALIDITY OF THE GRAND JURY.

3. MOTION TO DISMISS INDICTMENT.

At a proceeding before Judge Raymond W. Starr, at Grand Rapids, Michigan, on August 15, 1960, George R. Cook, an attorney from Grand Rapids, and Stanley Fleishman, an attorney from Hollywood, California, appeared on behalf of the defendants.

Richard F. VanderVeen and George R. Cook filed formal appearance for the defendants on August 18, 1960. [2.]

At the August 15, 1960 proceeding, the court directed that if the Government or the defendants intended to file any further motions in this action, they should be filed and served on or before September 30, 1960.

The Grand Jury which returned an indictment in this case was impaneled on September 16, 1959, and the indictment was returned May 24, 1960.

During pendency of proceedings before the Grand Jury, Mr. Stanley Fleishman, one of the attorneys for the defendants, requested that he be allowed to appear before the Grand Jury to argue defendants' innocence and the constitutionally protected nature of the books in question. The District Attorney permitted Mr. Fleishman to send a letter to the Grand Jury, then in session, stating why, in his opinion, no indictment should be returned in this case.

Mr. Fleishman sent Grand Jury Exhibit No. 39, a letter dated April 19, 1960, addressed to the foreman of the Grand Jury and to the Grand Jury, together with a copy of a letter from the firm of Brock, Fleishman and Rykoff, dated December 18, 1958, signed by Mr. Fleishman. This latter letter was an opinion of Mr. Fleishman to Saber Books and Fabian Books, 2919 Belmont Avenue, Fresno, California, in which he advised that certain named books were constitutionally protected expressions, and as such, freely distributable.

Mr. Fleishman quoted extensively from Chief Judge Yankwich's opinion in a Southern District of California case, which involved an obscenity question. This

Mr. Fleishman told the Grand Jury, was a reasonably fair statement of the law on the question of obscenity. [3.]

Thus, the defendants were well aware, over a month before return of the indictment, of the exact nature and extent of the charges which the Grand Jury was considering.

At that time the same factual information upon which defendants predicated the challenge to the array was "open and available" to them, as well as it was on March 27, 1962.

Later, in oral arguments before the court on August 15, 1960, Mr. Fleishman said:

> "I am sure, that all things considered, we would get a *fair trial* here, except for the fact we are so far from home, we are so far from everything that makes *a fair trial* possible, in the sense that the constitution talks about having *a trial* in your home, where you have your friends, where you have the witnesses, where you have the parties, to defend it.
>
> "Your Honor, it takes three days, three days for me to argue this motion. I traveled all day yesterday; I am here today; and I won't get home until Tuesday, to make a motion for change of venue at great expense and great personal inconvenience.
>
> "There is no need for that, your Honor. It is harsh; it is oppressive. The government has served its function. *The grand jury has returned an indictment. We are not asking this court to quash that indictment. All we say,* your Honor,

is let us have the trial in a place where we have a fair opportunity to defend ourselves." (Tr. 33-34) (Emphasis supplied.)

Defendants' first motion in this case was to transfer the action to the Southern District of California. Had the transfer been granted, surely the challenge of an allegedly unlawfully convened Grand Jury and other claimed Grand Jury irregularities would never have been made.

On February 13, 1962, Judge Starr filed his opinion denying defendants' motion to transfer the action to California.

The defendants were arraigned on March 2, 1962.[2] At that time, the following conversation took place: [4.]

"Mr. Quinn: (Assistant District Attorney) If the court please, the government at this time would also ask the court to entertain an oral motion requesting that a time limit be established by the court for the filing of all pretrial motions in this case . . .

"The Court: In order that this case may move along toward trial, the court orders and directs that any and all motions which each or any or all of the defendants desire to file in this criminal action shall be filed in this court within thirty days from this date. Is that plain?

"Mr. Cook: (Attorney for defendants) Very plain, your Honor."

[2]One of the original defendants, Mr. Matthew Meehan, had died before arraignment.

The motion was directed to all pretrial motions and not to all pre-arraignment motions. Motions to the competency of the Grand Jury or to the sufficiency of the indictment or information, are pre-arraignment motions. Federal Rules of Criminal Procedure, Rule 12(b)(3).

Defendants delayed filing the motion to dismiss the indictment on their challenge to the array until March 27, 1962, one year, ten months and three days after the return of the indictment against them, and one year, eleven months and eight days after defendants' counsel, Mr. Fleishman's specially privileged letter to the Grand Jury.

In the case of Agnew v. United States, 165 U.S. 36, 44; 41 L.Ed. 624, 627, Chief Justice Fuller delivered the opinion of the United States Supreme Court, and said:

> "Dr. Wharton lays it down (Wharton on Crim. Pl. and Pr., Sections 344, 350) that 'material irregularities in selecting and impaneling the Grand Jury, which do not relate to the competency of individual jurors, may usually be objected to by challenge to the array, or by motion to quash', or by plea and abatement; that the question of the mode in which such objections are to be taken largely depends upon local statute, *but that certain rules may be regarded generally applicable. One of these rules is that the defendant must take the first opportunity in his power* [5.] *to make the objections. Where he is notified that his case is to be brought before the Grand Jury, he should proceed at once to take exception to its competency, for if he lies by until a bill is found, the exception may be too late:* but where he has no opportunity of object-

ing before a bill is found, then he may take advantage of the objection by motion to quash or by plea and abatement, the latter in all cases of contested facts being the proper remedy.

"United States v. Gale, 109 U.S. 65 (27:857). Another general rule is that for such irregularities as do not prejudice the defendant he has no cause of complaint and can take no exception. U.S. v. Richardson, 28 F. 65; U.S. v. Reed, 2 Blatchf. 456; U.S. v. Tallman, 10 Blatchf. 31; State v. Melior, 13 R.I. 666; Cox v. People, 80 N.Y. 500; People v. Petrea, 92 N.Y. 129.

"The original venire was issued November 18, the second venire issued December 2, 1895. The court opened December 3, 1895, and, the indictment was returned December 12, yet defendant did not file his plea in abatement until December 17."[3]

"*The plea does not allege want of knowledge of threatened prosecution on the part of the defendant, nor want of opportunity to present his objections earlier*, nor assign any ground why exception was not taken or objection made before; moreover, the plea is fatally defective in that although it is stated that the drawing 'tended to his injury and prejudice' no grounds whatever were assigned for such a conclusion, nor does the record exhibit any such." (Emphasis supplied.)

Defendants' motion in this case is without either plea or evidence that they had no opportunity to object before the bill was found, and certainly they cannot plead lack of knowledge of threatened prosecution.

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[3]Defendants' challenge in Agnew was fourteen days after opening of court, five days after return of the indictment.

In Cook v. United States, 4 F. 2d 517 (CCA, 5th, 1925), Circuit Judge Walker said at Page 518:

> *"For ought that was made to appear, he had abundant opportunity to object to the competency of the Grand Jury before the indictment was found, and certainly much sooner than he did so after the indictment was returned.* No explanation or reason for the delay was disclosed. Such an objection to a Grand Jury cannot properly prevail, *unless it is made promptly after an opportunity to make it is presented."* [6.]
>
> "Agnew v. U.S. 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624; Wolfson v. U.S. 101 F. 430, 41 CCA 422; Powe v. U.S., 2 F. 2d 975 (United States Circuit Court of Appeals, Fifth Circuit, present term.)
>
> "The overruling of the motion to quash the indictment was justified because the *objections made to the competency of the Grand Jury came too late, whether they could or could not properly have prevailed, if they had been made with due promptness."* (Emphasis supplied.)

Clearly, defendants in this present case in fact had "abundant opportunity to object to the competency of the Grand Jury before the indictment was found, and certainly much sooner than [they] did after the indictment was returned".

Neither Rule 6 nor Rule 12 of the Federal Rules of Criminal Procedure[1] changes the intent and purpose of

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[1]Rule 6(b) Objections to Grand Jury and to Grand Jurors. (1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand

the rule [7.] of the Agnew case, excepting, however, the rules do give the court the power for *good cause shown*, to grant relief from a waiver.

In this Sixth Judicial Circuit, Poliafico v. United States, 237 F. 2d 97 (CCA, 6th, 1956), the principles presently applied were recognized. While the defendants in that case challenged the Grand Jury for the first time during the impaneling of the petit jury, the notorious facts of this case make the Circuit Court's ruling precisely applicable.

"In keeping with the provisions of Rule 12 of the Federal Rules of Criminal Procedure, *a motion*

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jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Rule 12(b). The Motion Raising Defenses and Objections.

(1) Defenses and Objections Which May be Raised. Any defense or objection which is capable of determination without trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for good cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

challenging the method of impanelling a grand jury must be made before the plea is entered except where the court permits it to be made within a 'reasonable' time thereafter. Failure to raise the objection within the prescribed time constitutes a waiver. See Notes of Advisory Committee on Rules, Federal Rules of Criminal Procedure, rule 12 note, 18 U.S.C.A., Agnew v. United States, 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624; Wright v. United States, 8 Cir., 165 F. 2d 405, 407; Carruthers v. Reed, 8 Cir., 102 F. 2d 933, 939." At page 110. (Emphasis supplied.) [8.]

Nor can an extension be concluded from the general language of Judge Starr on Pages 3 and 10 of the transcript of the arraignment on March 2, 1962. The nature of the challenge to competency of the Grand Jury is such that it must be specifically reserved and good cause must be shown why the motion was not raised before the arraignment. Poliafico v. United States, supra.

At all times before and since the August 15, 1960 hearing, defense counsel remained conspicuously silent on the subject of alleged incompetency of the Grand Jury, as well as any intentions to challenge the Grand Jury array, or its indictment. Therefore, under the Federal Rules of Criminal Procedure, defendants have waived their challenge. 12(b)(1), (2) and (3), Poliafico v. United States, supra.

In addition, on August 15, 1960, over four months after defense counsel, Mr. Fleishman, addressed a letter to the Grand Jury, and nearly three months after the Grand Jury returned its true bill, Mr. Fleishman

said: "We are not asking this court to quash that indictment".

This statement, standing alone, is sufficient to constitute an express waiver.

Also, defendants' motion to transfer the case to the Southern District of California constitutes an implied waiver to any challenge to the array or the indictment.

The very nature of a motion to transfer is to place the case in a posture for trial. Defendants wanted the case transferred to a jurisdiction where they could have *a fair trial,* that is, dispose of the case by plea or on its merits. [9.]

The whole thrust of the motion to transfer is that the indictment is good and defendants are ready to proceed to trial. (See oral arguments, August 15, 1960.)

The implied waiver is again re-emphasized by the motion to reargue the motion to transfer.

The defendants here waited until they received an adverse decision on their motion to transfer before making any application to the court to dismiss the indictment on the grounds of challenging the array, or on general grounds.

As the Fifth Circuit stated in Wolfson v. United States, 101 F. 430, 432 (CCA, 5th, 1900), Cert. denied 180 U. S. 637:

> "A defendant under bond, whose case is to be examined by the grand jury, should, if opportunity is presented, make his objections to the grand jury before it passes on the case. He should not be permitted, *knowing that his case is to be presented to the grand jury, and having an opportunity to*

object to its competency, to wait, and take chances, and then object to it after an indictment is found." (Emphasis supplied.)

When the defendants awaited the ruling on the transfer motion, they "took their chances". It follows that they have deliberately waived the right to object to the array.

The Agnew rule is a vital proposition of law, stated and restated in a long line of cases.

For example, in Wagner v. United States, 67 F. 2d 656, 657, 658 (CCA, 9th), defendants filed a plea in abatement which alleged that the grand jury which found the indictments was not drawn in accordance with law. Judge Sawtelle said:

> *"Examining the plea in abatement in the instant case, we find that it makes no reference whatsoever to the appellant's want of knowledge of threatened prosecution, nor want of opportunity to present his objection earlier, nor assign any ground why exception was not taken or objection made before."* [10.]

* * *

"Such a plea must be pleaded with strict exactness."

The court then proceeded to quote extensively from the Agnew case, supra. The court then added:

> "The Agnew case has been repeatedly approved in later decisions of the Supreme Court, and has been followed by this and other Circuit Courts of Appeals.
>
> "In Olmstead v. United States, 19 F. 2d 842, 845; 53 A.L.R. 1472, affirmed 277 U.S. 438, 48 L.Ed. 564, 72 L.Ed. 944, 66 A.L.R. 376, the late

Judge Gilbert, of this court, said: *'And it is uniformly held that a plea in abatement to an indictment, being a dilatory plea and not favored in law, must be pleaded with strict exactness and with certainty,* accuracy, and completeness, and must set forth facts, and not conclusions of law, nor evidence of facts, *and that every inference must be against the pleader."* (Emphasis supplied.)

* * *

"We are deciding the case solely upon the theory that the appellants have failed to negative, in their proof as well as in their pleading, prior knowledge of the indictment and opportunity to have objected to the method or legality of organizing the grand jury, or opportunity to have filed their pleas in abatement at an earlier time; and further, upon the theory that they have neither properly pleaded nor proved 'injury' or 'prejudice' resulting to them from being indicted by the grand jury as constituted in this case." (Emphasis supplied.)

At no time did defendants ask for time to file a specific motion challenging the array. Since the court may grant additional time for the purpose of filing a motion to challenge the array upon good cause shown, a general request to file motions without specific reference to a challenge to the array or to an indictment and the showing of good cause is insufficient to preserve a challenge to the array or the indictment. [11.]

The fact that the court granted permission to present testimony and arguments concerning competency of the grand jury indictment does not constitute a waiver by the court.

All this was specifically taken subject to the objection of the Government; and, also, to give the court an opportunity to re-examine and reconsider the effect and force of Agnew.

Nor may it be interpreted as a grant of permission to belatedly file the questioned motions.

The court permitted full discussion of all motions and the presentation of all testimony as an accommodation to Mr. Fleishman, because of the distance he had traveled (see transcript, August 15, 1960, page 33), and so that in the event the court concluded otherwise than it has in this opinion, it would be unnecessary for Mr. Fleishman to return to this District.

At a conference before oral arguments on all motions, the court's position was made clear on the record. (See transcript, March 13, 1963, Pages 2-13.)

In Miranda v. United States, 255 F. 2d 9, 16 (CCA, 1st, 1958), Judge Maris wrote:

> "The defendant also contends that the indictment against him was defective * * * His contention * * * was raised after trial in his motion in arrest of judgment. The district court correctly refused to admit evidence in regard to this matter on the ground that the defendant's challenge to the panel came too late. *For it is well settled that an objection to the array or panel is required to be presented at the early stages of the proceeding,* Agnew v. U.S. * * * (and other cases), Fed. Rules Crim. Proc. rules 6(b) and 12. *otherwise it is considered waived.*" Omitting cases cited. (Emphasis supplied.)

While U.S. v. Giboy, 162 F. Supp. 384, 389-391 (D.C. M.D. Pa., 1958) concerned an attempt to disqualify the trial judge [12.] yet its reasoning and reference is related to Agnew. After setting out the statute concerning disqualification, 28 USC §144, the court said:

"The indictment was returned and the arrest made in the October 1956 term; the arraignment and the defendant's motions seeking affirmative relief and arguments thereon in the March 1957 term; the opinion and orders denying defendant's motions during the October 1957 term. It was not until after defendant failed to obtain favorable rulings on his motions, to receive special treatment or a 'sign of recognition' at the arraignment that he decided to file the affidavit and certificate seeking disqualification based upon matters which allegedly had occurred and were known to the defendant some years before the return of the indictment. No cause was shown for the delay."

Quoting another case, the court continued:

"The statute, by its express terms, requires diligence in filing * * * and does not permit a litigant, after he has knowledge of the alleged bias or prejudice * * * without notice, to go forward in the cause before filing such affidavit after the facts of disqualification are known to him. * * *

"Any well functioning system * * * should * * * require immediate challenge to the eligibility of the judge as soon as the facts leading to apprehension of bias become known: strict compliance upon waiver in the absence of such protest

is necessary to prevent *last minute 'discovery' of the bias* * * *. * * * *and see and cf. Agnew v. U. S.* '* * * *defendant must take the first* opportunity in his power to make the objection'."

"* * * the circumstances were such as to justify belief that the affidavit was purposely held back, and its use on the eve of trial resorted to for the purpose of securing a postponement. Shea v. United States, supra, 251 F. at page 435.

"Timeliness is a matter of substance and not merely one of form, United States v. Parker, supra, 23 F. Supp. at page 885; United States v. 16,000 Acres of Land, etc., supra, 49 F. Supp at page 656. *The privilege is waived by failure to use due diligence.* (Omitting cases cited.)

"Thus, construed, the statute affords a party full opportunity to prevent the trial of his case by a judge against whom he can state under oath facts showing bias or prejudice. At the same time it affords to the other party and to the public protection against unnecessary surprise, delay and expense * * *." Chafin v. United States, supra, 5 F. 2d at page 595." (Emphasis supplied.) [13.]

Thus, by every conceivable norm of judgment, both motions challenging the grand jury's competency and the indictment are untimely. An examination of the proceedings as a whole, to this point, clearly impresses these motions with a badge of studied diliatory tactics.

As late as January 14, 1963, in the case of Shotwell Mfg. Co. v. United States, 287 F. 2d 667, (CCA. 7th, 1961), affirmed 371 U. S. 341, 9 L. Ed. 357, the Supreme Court had occasion to consider the effect of

the Agnew rule as expressed in Federal Rules of Criminal Procedure, Rule 12(b)(2).

In that case defendants sought to attack the array four years after the trial. Citing Rule 12(b)(2), the Supreme Court said:

> "We think, as the two lower courts did, that petitioners have lost these objections by years of inaction.
>
> * * *
>
> "In the circumstances of this case, petitioners' contentions are without foundation. In denying the motions the District Court found that *the facts concerning the selection of the grand and petit juries were notorious and availabile to petitioners in the exercise of due diligence before the trial.* The same method of selecting jurors in the district had been followed by the clerk and the jury commissioner for years. Inquiry as to the system employed could have been made at any time. * * * And Ballard lends no support to petitioners' position, for in that case the challenge to the jury panel had been timely made and preserved. See 329 U. S. at 190." At Page 372-3. (Emphasis supplied.)

Thus, in the instant case, the facts upon which defendants rest their motions challenging the array were "notorious and available" to them "in the exercise of due diligence" on April 19, 1960, and before, as well as on March 27, 1962. [14.]

The government's motion to strike is granted.

For purposes of thoroughness, the court feels it proper to here state in its opinion that the attack on the ar-

ray, on its merits, is not well taken. U.S. v. Dennis, 183 F. 2d 201, affirmed 341 U. S. 494; Thiel v. Southern Pacific Company, 328 U. S. 217; Ballard v. United States, 329 U. S. 187; Poliafico v. United States, supra, and I find as a matter of fact that the defendants have failed to meet their burden of proof.

The court also holds that the statement by Mr. Fleishman on August 15, 1960, constituted a waiver of the right to file a motion to dismiss on grounds other than the challenge to the array. This motion, too, must fail.

In addition to the express waiver, the merits of defendants' motion to dismiss the indictment on ground other than the challenge to the array have been thoroughly discussed and properly disposed of by U. S. v. Roth, supra.[5] [15.]

* * * *

[5]Relevant to defendants' claim that these statutes create a national censorship and restrict the public's access to reading material is the following. John Courtney Murray, *We Hold These Truths*, Sheed and Ward, Pages 164-165:

"Considerations such as these would seem to indicate that the problem of social freedom is insoluble, if by solution is meant a simple formula that is applicable to all cases and similar for all countries. However, a community can do one important thing; it can decide on the general orientation it wishes to give to its particular solution. We have done this in the United States. We have constitutionally decided that the presumption is in favor of freedom, and that the advocate of constraint must make a convincing argument for its necessity or unity in the particular case.

"I would only add that the presumption in favor of freedom does not rest on doctrinaire grounds. Its basis was not the philosophic rationalism that called itself Enlightenment, but only a political pragmatism more enlightened than the Enlightenment ever was, because it looked to the light of experience to illuminate the prudential norms necessary to guide it in handling a concrete social reality that is vastly complicated. In this light the option was made for the civil freedom of the citizen under a government whose powers are limited, and under a rule of the law whose reach is likewise limited, chiefly by the axiom that

the constraints of law must serve the cause of essential social freedom."

"In our case, the consequence of this fundamental option, which gives a basic orientation to our constitutional law, is that freedom of expression is the rule, and censorship the exception. A more particular further consequence is the ban laid by the First Amendment (exceptional cases apart) on all prior restraint of communications, at the same time that the government reserves the right to punish, subsequently, communications that offend against law. The freedom toward which the American people are fundamentally orientated is a freedom under God, a freedom that knows itself to be bound by the imperatives of the moral law. Antecedently it is presumed that a man will make morally and socially responsible use of his freedom of expression; hence there is to be no prior restraint on it. However, if his use of freedom is irresponsible, he is summoned after the fact to responsibility before the judgment of the law. There are indeed other reasons why prior restraint on communications is outlawed; but none are more fundamental than this.

"After this brief discussion of the central issue involved in censorship I come to my proposition. It may be briefly stated thus: censorship in the civil order ought to be a juridical process. In using the word 'juridical' I mean that the premises and objectives of the process should be defined in accord with the norms of good jurisprudence; that the forms of procedure should be properly judicial; and that the structure and workings of the process should be sustained by the consent of the community. I should maintain that this concept of a juridical process should be verified, *mutatis mutandis*, in every form of censorship, whether governmental or non-governmental." [16.]

APPENDIX C.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . ."

2. The pertinent provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; . . ."

3. The provisions of 28 U. S. C. 1651(a) are:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the useages and principles of law."

4. The pertinent provisions of Rule 6 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., are:

> *"Rule 6. The Grand Jury*
>
> * * *
>
> *"(b) Objections to Grand Jury and to Grand Jurors.*
>
> *(1) Challenges.* The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of

jurors on the grounds that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment."

* * *

5. The pertinent provisions of Rule 12 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., are:

"Rule 12. Pleadings and Motions before Trial; Defenses and Objections

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The Motion Raising Defenses and Objections.

(1) Defenses and Objections Which May Be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fail to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered; but the court may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct."

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 355

SANFORD E. ADAY, WALLACE DE ORTEGA MAXEY, AND WEST COAST NEWS COMPANY, INC., A CALIFORNIA CORPORATION, PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, AND NOEL P. FOX, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals dismissing the petition for mandamus (R. 95–102) is reported at 318 F. 2d 588. The opinion of the district court (R. 51–76) is reported at 216 F. Supp. 911.

JURISDICTION

The order of the court of appeals was filed on June 12, 1963. By order of Mr. Justice Stewart, dated

699-713—63

July 2, 1963, the time for filing a petition for a writ of certiorari was extended to and including August 11, 1963. The petition was filed on August 9, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a writ of mandamus should issue to require the district court to vacate its order striking and denying petitioners' motion to dismiss the indictment against them by reason of the composition of the grand jury which returned it.

STATEMENT

Petitioners were indicted on May 24, 1960, charged in 19 counts with violation of 18 U.S.C. 1461 and 1462 (mailing and transportation of obscene matter) (R. 22–32). On August 15, 1960, they filed a motion pursuant to Rule 21(b), F.R. Crim. P., to transfer the case to the United States District Court for the Southern District of California (R. 108). The motion was denied on February 13, 1962 (30 F.R.D. 13), and petitioners were arraigned on March 2, 1962 (R. 140–149). On March 30, 1962, they filed a motion to dismiss the indictment because of alleged invalidity in the selection of the grand jury (R. 33–35).[1] On December 3, 1962, they filed a motion for renewal and reargument of their motion to transfer, claiming an intervening change both in the law and in their situation. On March 12, 1963, the United States filed a motion to strike petitioners' motion challenging the

[1] They also filed a motion to dismiss upon other grounds and a motion for a bill of particulars.

selection of the grand jury, on the ground that it was untimely (R. 36–37). All motions were argued on March 13, 1963, and evidence in support of petitioners' motion relating to the grand jury was taken on March 13 through March 15 (R. 150–526).[2] On March 29, the district court entered an order granting the motion of the United States to strike petitioners' motion attacking the selection of the grand jury and denying the various motions of petitioners. (R. 48–49).

On April 19, 1963, the district court filed an opinion in support of its order (R. 51–76; 216 F. Supp. 911). So far as the grand jury aspect was concerned, it found an implied waiver of petitioners' challenge to the array because they failed to assert their claim prior to indictment (although they knew that the grand jury was considering charges against them) and because their initial motion to transfer, if granted, would have precluded their later challenge to the array. The court also found an express waiver

[2] The gist of petitioners' attack on the grand jury was a contention that the persons whose names were placed in the jury box constituted a disproportionate reflection of what they asserted were the various classes residing in the Western District of Michigan, Southern Division, and a contention that the jury officials made no inquiry concerning the qualifications of such persons before their names were placed in the box (some 1200 to 1400 names were placed in the box initially, and replenishments over a five year period brought the total placed therein to some 4000 names). They offered as witnesses the clerk and the jury commissioner, who testified to the procedures used to fill the box, and a doctor of sociology and anthropology, who, on the basis only of the names drawn from the box (and in some instances not all of the names), testified in essence that the selection was not sufficiently random to meet the standards of research methodology (R. 234–235, 239).

to the challenge in the statement by their counsel on August 15, 1960, during argument on the original motion to transfer, that "[w]e are not asking this court to quash the indictment".[3] In addition, the court stated: "For purposes of thoroughness, the court feels it proper to here state in its opinion that the attack on the array, on its merits, is not well taken * * * and I find as a matter of fact that the defendants have failed to meet their burden of proof" (R. 65; 216 F. Supp. at 921).[4]

Petitioners thereupon simultaneously sought mandamus in this Court to vacate that part of the district court order which denied their motion to transfer, and mandamus in the court of appeals to vacate that part of the order which denied their motion to dismiss. This Court denied leave to file a petition for a writ of mandamus on June 17, 1963. 374 U.S. 823. The court of appeals dismissed their petition to that court on the ground that they were seeking "an interlocutory appeal" prior to "final adjudication of the case on its merits in the District Court", and that "[t]his case is not such as to require the use of the extraordinary writ of mandamus" (R. 102; 318 F. 2d at 591).

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[3] Among the cases cited by the court in support of its holding of untimeliness were *Agnew* v. *United States*, 165 U.S. 36; *Cook* v. *United States*, 4 F. 2d 517 (C.A. 5, 1925); *Poliafico* v. *United States*, 237 F. 2d 97 (C.A. 6, 1956); *Wolfson* v. *United States*, 101 Fed. 430 (C.A. 5, 1900); and *Wagner* v. *United States*, 67 F. 2d 656 (C.A. 9, 1933).

[4] In support of this holding, the court cited *United States* v. *Dennis*, 183 F. 2d 201 (C.A. 2, 1950), affirmed, 341 U.S. 494; *Thiel* v. *Southern Pacific Company*, 328 U.S. 217; *Ballard* v. *United States*, 329 U.S. 187; and *Poliafico* v. *United States*, *supra*.

ARGUMENT

The district court exercised its authority and came to a full determination on the merits of the motion attacking the selection of the grand jury. As the court observed, timeliness is a matter of substance. Compare *Hyde* v. *United States*, 225 U.S. 347, 373; *Wagner* v. *United States*, *supra*, 67 F. 2d at 657. Moreover, the court also found that petitioners had failed to carry their burden of proof on the merits—a determination made after a three-day hearing.[5] There is plainly no contradiction to be found in the fact that the district court rested on alternative holdings, concluding that the challenge was both untimely and lacking in merit. Cf. *United States* v. *Shotwell Manufacturing Company*, 287 F. 2d 667, 673 (C.A. 7, 1961), affirmed, 371 U.S. 341; *Scales* v. *United States*, 260 F. 2d 21, 45 (C.A. 4, 1958), affirmed, 367 U.S. 203; *Agnew* v. *United States*, *supra*; *Wagner* v. *United States*, *supra*.

[5] Contrary to petitioners' assertion (Pet. 29), there was no further evidence to be presented that was relevant to their burden of proof. The lack of necessary evidence in the record concerning the identity and description in regard to age, occupation, etc. of all of the persons whose names were in the jury box was due solely to petitioners' failure to develop such information in timely fashion (see R. 450–451). The other additional evidence to which petitioners allude (see Pet. 9–10) was merely cumulative. Additional briefing and proposed findings of fact and conclusions of law were, of course, discretionary with the district court, and, in point of fact, petitioners' attorney submitted to the district court, prior to the issuance of its opinion, a lengthy letter containing legal argument (R. 39–47) which served the function of a brief on the question of timeliness.

As the court of appeals correctly held, mandamus is not available to obtain review of an interlocutory order which is unappealable prior to final judgment. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 27; *Parr* v. *United States*, 351 U.S. 513, 520–521. If there was any error in the determination made by the district court (which we deny), the matter may be reviewed in the event of an ultimate conviction. It is "only where appeal is a clearly inadequate remedy" that the "drastic and extraordinary" remedy of mandamus, which has "the unfortunate consequence of making the judge a litigant," may be employed. *Ex parte Fahey*, 332 U.S. 258, 259–260.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.
Assistant Attorney General.
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

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